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In the Supreme Court of the United States

OCTOBER TERM, 1980

SHIRLEY M. HUFSTEDLER, SECRETARY OF EDUCATION, ET AL.

v.

DOUGHERTY COUNTY SCHOOL SYSTEM, ACTING THROUGH THE DOUGHERTY COUNTY BOARD OF EDUCATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a regulation prohibiting employment discrimination based upon sex "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance" (34 C.F.R. 106.51(a)(1)) is authorized by Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682.

* The named defendants-appellants in the court of appeals were the Department of Health, Education, and Welfare and Patricia Roberts Harris, who was Secretary of Health, Education, and Welfare until the enactment of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668. Under Section 301(a)(3) of that Act, 93 Stat. 678, the functions of HEW under Title IX were transferred to the Department of Education. Because Secretary Hufstedler is the successor to Secretary Harris with regard to these functions, we have substituted Secretary Hufstedler and the Department of Education as the federal parties in this case, pursuant to Rule 40.3 of the Rules of this Court.

There were no additional appellees in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes and regulations involved	1
Statement	2
Reasons for granting the petition	5
Conclusion	6
Appendix A	1a
Appendix B	8a
Appendix C	9a
Appendix D	12a

TABLE OF AUTHORITIES

Cases:

Brunswick School Board v. *Califano*, 449 F. Supp. 866, aff'd *sub nom. Islesboro School Committee* v. *Califano*, 593 F.2d 424, cert. denied, 444 U.S. 972	3-4
North Haven Board of Education v. *Hufstedler*, 629 F.2d 773	5
Romeo Community Schools v. *HEW*, 438 F. Supp. 1021, aff'd, 600 F.2d 581, cert. denied, 444 U.S. 972	4
Seattle University v. *HEW*, No. 77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992, petition for cert. granted, No. 80-493 (Dec. 1, 1980)	4

Statutes and regulations:

Education Amendments of 1972, Title IX, 20 U.S.C. 1681 *et seq.*	2
Section 901(a), 20 U.S.C. 1681(a)	1, 2
Section 902, 20 U.S.C. 1682	1, 2
34 C.F.R. 106.51 *et seq.*	2
Section 106.51(a)(1)	1
Section 106.54	1
45 C.F.R. 86.51 *et seq.* (1979)	2

The Solicitor General, on behalf of the United States Department of Education and the Secretary of Education, Shirley M. Hufstedler, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 622 F.2d 735. The opinion of the district court (App. C, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1980 (App. B, *infra*). On October 17, 1980, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including December 23, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the statutes involved (Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682) are printed at pages 1-5 of the petition in *United States Department of Education* v. *Seattle University*, No. 80-493 (October Term 1980).[1]

2. The pertinent regulations (34 C.F.R. 106.51 (a)(1) and 34 C.F.R. 106.54) are printed at pages 5-6 of the petition in *Seattle University*.

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[1] We are supplying respondent with a copy of our petition in *Seattle University*.

STATEMENT

The Dougherty County School System (hereinafter "Dougherty County") filed this action on June 13, 1978, to enjoin an administrative enforcement proceeding brought by the Department of Health, Education, and Welfare (HEW)[2] under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX").

Dougherty County receives federal financial assistance in support of its educational programs and activities (App. A, *infra*, 6a-7a), and it is therefore subject to the provisions of Title IX and to authorized implementing regulations promulgated by the federal agencies and departments through which it receives such financial assistance. Section 902 of Title IX, 20 U.S.C. 1682.

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.* (1979) (now codified at 34 C.F.R. 106.51 *et seq.*).

In January 1976, HEW notified the superintendent of Dougherty County that it had received a com-

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[2] As explained above (page I note * *supra*), the functions of HEW under Title IX of the Education Amendments of 1972 have been transferred to the Department of Education. All of the relevant actions in this case were taken by HEW prior to the reorganization.

plaint from a female home economics teacher alleging sex discrimination in the payment of salaries, in violation of Title IX. HEW conducted an investigation of the complaint, and on November 15, 1976, sent a letter of findings to Dougherty County which concluded that the payment of a 12% salary supplement to industrial arts teachers without payment of a similar supplement to home economics teachers constituted sex discrimination. The letter requested that the school system take action to correct the discrimination (R. 14-15). After Dougherty County declined to take corrective action, HEW commenced administrative proceedings seeking to terminate federal financial assistance (R. 6, 30-33, 150, 250). Prior to a scheduled administrative hearing, however, Dougherty County filed its complaint in the district court seeking an injunction against further administrative enforcement action and a declaratory judgment that the Title IX regulation which was the basis for that action was promulgated in excess of the Secretary's authority under the statute (R. 3-9).[3]

2. On cross-motions for summary judgment, the district court ruled for Dougherty County, holding that Title IX "does not cover employment practices of recipients of federal financial assistance and does not authorize the Secretary to promulgate regulations prohibiting sex discrimination in employment" (App. C, *infra*, 10a). In a two-page order, the court adopted the reasoning of three prior district court opinions: *Brunswick School Board* v. *Califano*, 449 F. Supp. 866 (D. Maine 1978), aff'd *sub nom. Isles-*

[3] As a result of a stipulation between the parties, the administrative process was halted and HEW lifted its deferral of consideration of applications by Dougherty County for funding of new activities.

boro School Committee v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); *Seattle University* v. *HEW*, No. 77-631S (W.D. Wash. Jan. 3, 1978), aff'd, 621 F.2d 992 (9th Cir. 1980), petition for cert. granted, No. 80-493 (Dec. 1, 1980); and *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979) (App. C, *infra*, 10a).

3. The court of appeals affirmed the grant of summary judgment declaring the regulations invalid (App. A, *infra*, 1a-7a). However, the court limited its decision to the "invalidity of the regulations as written, without agreeing with the district court and the three circuit courts that the Secretary's authority is limited to regulation only of policies affecting students" (App. A, *infra*, 4a). In contrast to the courts of appeals in *Romeo Community Schools* v. *HEW*, *supra*, *Seattle University* v. *HEW*, *supra*, and *Islesboro School Committee* v. *Califano*, *supra*, the court concluded that both the language of the statute and the legislative history "support[] an interpretation of the statute that reaches at least some employment practices" (App. A, *infra*, 7a). The court reasoned that, under the allegations in this case, a female home economics teacher whose salary is defrayed by federal funds and who is paid less than a male vocational education teacher for equal work is "subjected to discrimination under" a program receiving federal financial assistance (App. A, *infra*, 7a). The court held, however, "that the Secretary exceeded his authority by enacting general regulations prohibiting sex discrimination in employment without limiting their effect to specific programs that receive federal financial assistance" (*ibid.*).

REASONS FOR GRANTING THE PETITION

Although the question presented in this case is not identical to that presented in *United States Department of Education* v. *Seattle University*, No. 80-493, in which this Court granted the petition for certiorari on December 1, 1980, the question is closely related and involves the same regulations at issue in *Seattle University*. While the court of appeals in the present case concluded that some regulation of the employment practices of educational federal aid recipients is authorized by Title IX, it affirmed the district court's judgment invalidating the regulations promulgated by HEW because they were not "limited to employees whose compensation is defrayed in whole or in part by federal assistance or even to those who work in programs receiving federal aid or with students who are federally assisted" (App. A, *infra*, 3a).

We disagree with the court of appeals that the specific purposes for which federal funds are used by an educational institution or school system properly control the scope of regulations under Title IX or the Department of Education's authority to investigate possible employment discrimination in the institution or system's educational program.[4] We therefore believe that its decision should be reversed. However, because this Court's decision in *Seattle University* may well be dispositive of the issue in this case, it would be appropriate for the Court to defer

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[4] We acknowledge, however, that the Department's fund-termination authority under Section 902 is limited to "the particular program or part thereof" in which discrimination or its effects are shown. See *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773, 785-786 (2d Cir. 1980).

disposition of this petition pending final disposition of the petition in *Seattle University*.

CONCLUSION

The Court should defer disposition of the petition for a writ of certiorari pending its decision in *United States Department of Education* v. *Seattle University*.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1980